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BRIEF OF THE PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 104.

HENRY A. M. SMITH, AS RECEIVER OF THE LATE CORPORATION NAMED AND STYLED, "THE PRESIDENT, DIRECTORS AND COMPANY OF THE STATE BANK," BUT COMMONLY CALLED "THE STATE BANK," &c.,

PLAINTIFF IN ERROR,

vs.

R. H. JENNINGS, AS TREASURER OF THE STATE OF SOUTH CAROLINA,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

T. W. BACOT,
Attorney of the Plaintiff in Error.
A. M. LEE, and
JULIAN MITCHELL, Jr.,
Of Counsel.

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BRIEF.

I.

"A CONCISE ABSTRACT, OR STATEMENT OF THE CASE, PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED."

Anno Domini 1854 the State of South Carolina, by an

Act, authorized and directed an issue of bonds in aid of the Blue Ridge Railroad Company.

The State Bank subscribed for and received one hundred thousand dollars of such bonds, to-wit, 100 bonds (Nos. 801 to 900) each for $1,000.00, paying therefor at par in gold.

The State Bank continued to hold and own the said one hundred thousand dollars of such bonds until 1865, when they (among other assets of the Bank) were taken from the agent of the Bank by soldiers in the invading army of the United States, then passing through the State of South Carolina.

In 1869 an Act was passed by the State of South Carolina to enable the Banks of the State to renew business or to place them in liquidation. Prior thereto, one George Garvin as a creditor of the State Bank had filed a creditor's bill in the Courts of the State of South Carolina against the State Bank, alleging the insolvency of the Bank, etc. Accordingly, in pursuance of the provisions of the said Act of 1869, the *Attorney General of the State* intervened in that suit, and, upon *his motion*, an order was made appointing James B. Betts as Receiver of all the assets of the State Bank, and orders were made enjoining and restraining the Treasurer of the State from paying or funding or converting or consolidating any of the said bonds, and requiring the Receiver by advertisements in the cities of Charleston and Columbia and New York to call upon all persons holding any of the said bonds to present the evidence of their right to them. In 1876, on motion of the Attorney General, Benjamin C. Pressley was appointed as Receiver in the place of the said James B. Betts, then deceased; and in 1878, on motion of the Attorney General, Samuel Lord was appointed as Receiver in the place of the said Benjamin C. Pressley, who had been elevated to the Bench; and on the 24th March, 1899, Henry A. M. Smith (the plaintiff in error) was duly appointed as Receiver in the place and stead of the said Samuel Lord, and is now the Receiver of the State Bank, the charter of which expired in 1874, and has never been renewed.

From time to time sixty-two of the said one hundred bonds came in and were recovered by the said Receivers and

were consolidated and converted and funded and paid, and the proceeds distributed under orders of the Court in said suit, leaving thirty-eight of the said one hundred bonds unrecovered and outstanding. Of the said sixty-two recovered bonds, four (Nos. 812, 821, 836 and 837, each for $1,000.00), which had found their way into the Treasury of the United States, were delivered up and the interest thereon collected paid to the said Samuel Lord, Receiver, under and by virtue of the following Act of Congress, (U. S. Statutes at Large, Vol. 21, page 532):

"An Act for the delivery to Samuel Lord, junior, receiver, of certain bonds now in the Treasury of the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and is hereby, authorized to deliver up to Samuel Lord, junior, receiver of the President, Directors, and Company of the State Bank, of Charleston, South Carolina, the following bonds, now in the Treasury of the United States, to-wit: bonds numbered eight hundred and twelve, eight hundred and twenty-one, eight hundred and thirty-six, and eight hundred and thirty-seven, each for the sum of one thousand dollars, being coupon bonds issued by the State of South Carolina in aid of the Blue Ridge Railroad Company, and signed by R. F. W. Allston, governor, and T. G. Pickens, comptroller-general, under an act of the general assembly of South Carolina, ratified on the twenty-first day of December, eighteen hundred and fifty-four, which were the property of the said The President, Directors, and Company of the State Bank, to be administered by the said Samuel Lord, junior, receiver, as he may be directed by the proper Court in South Carolina, under which he holds his appointment of receiver as aforesaid. And the Secretary of the Treasury is hereby authorized and directed to pay to the said receiver of said Bank, out of any money in the Treasury not otherwise appropriated, the sum of four hundred and seventy-nine dollars, collected of the coupons for interest on said bonds, and heretofore covered

into the Treasury of the United States, to be administered by said receiver as hereinbefore provided.

"Approved, January 16, 1880."

A supplemental complaint and answers thereto having been filed in June, 1894, thereupon on the 29th of June, 1894, an order was made in the said suit referring the case to a Master to enquire and report which, if any, of the said one hundred bonds had been funded, and which, if any, were still outstanding and unpaid and unfunded, with leave to report any special matter. The Master reported that thirty-eight of the said one hundred bonds (which he enumerated by their specific serial numbers) were still outstanding and unpaid, and that the said bonds were the property of the State Bank, and that the Receiver of the said Bank was the only person entitled to fund and collect the same from the Treasurer of the State. And on the 21st August, 1894, the Court confirmed the Report of the Master, and decreed that the said thirty-eight bonds are the property of the State Bank and that the Receiver of the said Bank is the only person entitled to fund and collect the same from the Treasurer of the State—the *Attorney General appearing for the State Treasurer who was a party.*

At the regular session of the General Assembly of the State of South Carolina, which was convened on the fourth Tuesday in November, A. D. 1894, the Receiver of the State Bank *under direction of the Court* presented to the General Assembly a memorial accompanied by a bill or a joint resolution for the consolidation and conversion and funding and payment of the said thirty-eight lost or destroyed bonds. This bill or Joint Resolution passed the Senate, and was sent to the House, and (pending an investigation by a special committee of three members of the House) was continued to the next session which under the new Constitution of 1895, was convened on the second Tuesday in January A. D. 1896, when a majority report in favor of the bill or joint resolution and a minority report against it were submitted by the said special committee to the House; but the House defeated it. At the same session (as a further precaution and as a *legislative* injunction as it were, in addition to

the foresaid *judicial* injunctions or restraining orders) the Act was passed forbidding *the State Treasurer* from consolidating, converting, funding or paying any coupon bond of the State payable to bearer and any coupon thereof after the expiration of twenty years from the date of maturity of such bonds.

The said thirty-eight bonds matured 1st July, 1879, and the twenty years expired therefore 1st July, 1899.

On the 27th March, 1896, (after the adjournment of the General Assembly) the Receiver of the State Bank applied by petition to the Supreme Court of the State of South Carolina, in its original jurisdiction, for a writ of *mandamus* against W. T. C. Bates as the then Treasurer of the State, requiring him, the State Treasurer, to fund, etc., the said thirty-eight lost or destroyed bonds, because of the aforesaid decree of 21st August, 1894. This cause was heard by the Supreme Court of four Justices on the 18th May, 1896, and was by order re-heard on the 30th May, 1896, by the full Court of four Justices and all the Circuit Judges except one. The petition was dismissed by a majority of the Court, who, while recognizing the justice and merits of this claim, held that *mandamus* would not lie, and that the Receiver's remedy was *legislative* and not *judicial*. (*Vide* the report of this case at pages 95 to 119 of volume 48 of South Carolina Reports). Mr. Chief Justice McIver, in his opinion at page 110, says: "Contrary to my first impression of this case, I am unable, after very careful and unusually protracted investigation, to reach the conclusion that the relator is entitled to the remedy which he invokes. *While fully convinced of the justice of the relator's claim to the bonds*, which he is seeking to have funded under the several funding acts referred to in the opinion of Mr. Justice Gary, I am unable to perceive that there is any such plain, ministerial duty imposed upon the Treasurer of the State by such funding acts, the performance of which can be enforced by the writ of *mandamus*." See also the opinion of the Court by Mr. Justice Gary at page 96, and the opinion of Judge Aldrich at page 112, and the dissenting opinions of Mr. Justice Jones at page

113 and Judge Earle (afterwards U. S. Senator) at page 117.

Therefore, after the expiration of twenty years from the date of maturity of the said bonds, and when the State could no longer be called on by *any other person* to pay them, to-wit, after the 1st July, 1899, the Receiver of the State Bank, *under direction of the Court*, again applied to the General Assembly to have the said thirty-eight lost or destroyed bonds consolidated, converted, funded and paid. The Governor of the State, recognizing like the Judiciary the justice and merits of this claim, by his three annual messages in 1900 and 1901 and 1902, favorably recommended it for consideration by the General Assembly—his annual message in 1902 concluding with these words: "Thus confirmed in my opinion and views upon the subject by the legal officer of the State, I cannot do otherwise than repeat my recommendation of last year, viz: that the claim of the Bank to be permitted to renew and fund these bonds is valid and just and should be allowed. It is not denied that the State owes the bonds to some one. They are carried as part of the debt of the State on the books of the Treasury, as owing to some one. The Courts have all decreed the Bank to be the owner; *no one else can now claim them*, as all persons but the Bank are barred under the Act of 1896 from doing so. I repeat, in the face of these facts, it will be little short of repudiation if we continue to refuse to allow the Receiver of the Bank to fund them."

The General Assembly, however, would not make provision for the consolidation, conversion, funding and payment thereof: but, to emphasize its repudiation of, and determined (if in its power) to put an end to, this just and lawful debt, which had been adjudicated by the Courts of the State in favor of the Receiver as aforesaid, (and in order to destroy all record and evidence of these bonds), actually and persistently passed in 1902 the Joint Resolution directing the State Treasurer to write the said bonds off of the books in his office and no longer carry them on the books *"as a debt of the State"*; which said Joint Resolution is now the subject of this writ of error—these bonds having always been carried on the books of the State Treasurer as a part of the lawful and valid debt of

the State, and every year appropriation having been made for the interest thereon.

This Joint Resolution of 1902 was vetoed by the Governor and was sent by him to the Senate (where it originated) un-approved and unsigned by him, and with his objections; and thereupon both of the Houses of the General Assembly attempted to pass it, the veto of his Excellency, the Governor, to the contrary notwithstanding. (*Vide* No. 173 at page 266 of Vol. 24 of the Statutes at Large of the State of South Carolina.)

Thereupon, the Receiver of the State Bank (the plaintiff in error), on the 19th March, 1903, applied by petition to the Supreme Court of the State of South Carolina, in its original jurisdiction, for a writ of injunction against R. H. Jennings as Treasurer of the State of South Carolina (the defendant in error), enjoining and restraining him (the said Treasurer) from writing the said bonds off of the books in his office and no longer carrying said bonds on the books *as a debt of the State*, upon the ground that the said Joint Resolution is unconstitutional, null and void, and that it has not the same effect as if it had been signed by the Governor, and did not become and is not a law, because it is repugnant to and in violation of (1) Section 8 of Article I, of the Constitution of the State of South Carolina, and also the first clause of Section 10 of Article I of the Constitution of the United States of America—(2) Section 16 of Article III of the Constitution of the State of South Carolina—and (3) Section 23 of Article IV of the Constitution of the State of South Carolina. On the said 19th March, 1903, an order was made requiring the State Treasurer to show cause why a writ of injunction should not issue as prayed in the said petition, by way of return whereto the said State Treasurer demurred to the said petition because (as alleged) it did not state facts sufficient to constitute a cause of action, thus *admitting all the facts stated in said petition.* The cause was heard on the 4th May, 1903, by the Supreme Court of the State of South Carolina, who on September 10, 1903, filed a decision or final judgment or decree refusing the injunction prayed for and dismissing the petition. And from

the said decision or final judgment or decree a writ of error has been duly allowed to this honorable Court.

All of which more fully appears in the Transcript of Record.

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The Assignment of Errors at pages 31-2 of the Transcript of Record is as follows, to-wit:

I.

That the Supreme Court of the State of South Carolina erred in deciding that the "Joint Resolution to authorize and require the State Treasurer to write off of the books in his office certain Bonds entered on said books as 'Old Bonds not Fundable (Act of 1896), Blue Ridge Railroad Bonds, $37,000,' " was constitutionally and legally passed by the General Assembly of the State of South Carolina over the Governor's veto thereof.

II.

That the Supreme Court of the State of South Carolina erred in deciding that the said Joint Resolution became a law and took effect as such notwithstanding the use of the word "resolved" in its style instead of the word "enacted."

III.

That the Supreme Court of the State of South Carolina erred in deciding that the said Joint Resolution does not impair the obligation of any contract and is not, therefore, repugnant to and in violation of either the "Federal" or the "State" Constitutions: It being submitted that said Joint Resolution did impair the obligation of the State's

own contract; in that it tended to, and did obliterate, invalidate and destroy the existence and validity of certain Bonds of said State, directed to be written and charged off under said Resolution; and obliterated, invalidated and destroyed the *evidence* as to the existence and continuing obligation of the same.

IV.

That the Supreme Court of the State of South Carolina erred in refusing the injunction prayed for and in revoking the temporary restraining order theretofore granted and in dismissing the petition of the said Henry A. M. Smith as Receiver as aforesaid.

III.

BRIEF OF THE ARGUMENT.

FIRST.

The first of the Assignment of Errors is as follows:

That the Supreme Court of the State of South Carolina erred in deciding that the "Joint Resolution to authorize and require the State Treasurer to write off of the books in his office certain Bonds entered on said books as 'Old Bonds not Fundable (Act of 1896), Blue Ridge Railroad Bonds. $37,000' " was constitutionally and legally passed by the General Assembly of the State of South Carolina over the Governor's veto thereof.

See "Eighth" at pages 11, 12 and 13, of the Transcript of Record.

(1) Article IV (Section 23) of the present Constitution of the State of South Carolina, ratified December 4, 1895. provides as follows:

"SECTION 23. Every Bill or Joint Resolution which shall have passed the General Assembly, except on a question of adjournment, shall, before it becomes a law, be presented to

the Governor, and if he approve he shall sign it; if not, he shall return it, with his objections, to the house in which it originated, which shall enter the objection at large on its Journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass it, it shall be sent, together with the objections, to the other house, by which it shall be reconsidered, and if approved by two-thirds of that house it shall have the same effect as if it had been signed by the Governor; but in all such cases the vote of both houses shall be taken by yeas and nays, and the names of the persons voting for and against the Bill or Joint Resolution shall be entered on the Journals of both houses respectively. * * * * * * If a Bill or Joint Resolution shall not be returned by the Governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the General Assembly, by adjournment, prevent its return, in which case it shall have such force and effect unless returned within two days after the next meeting."

It requires (1) *two-thirds of each house* (*i. e.* two-thirds of *all the members*, NOT OF *of a constitutional quorum*, of each house) to pass a bill or joint resolution that has been unapproved and unsigned by the Governor—and (2) a *re*-turn to and *re*-consideration by *the same, not a new*, General Assembly of such a bill or joint resolution.

Section 11 of Article III of the said Constitution of the State of South Carolina prescribes that, "Each house shall judge of the election returns and qualifications of its own members, *and a majority of each house shall constitute a quorum to do business*; * * *." There is no other provision in the Constitution as to a quorum.

The 7th Section of Article IX of the previous State Constitution of 1868 provided as follows:

"For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; *and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas*

and nays on the journals of each house respectively; and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

This Section was amended in 1871-3 by Article XVI, so as to prohibit the creation of any further public debt *without the consent of two-thirds of the qualified voters of the State* VOTING ON THE QUESTION *at a general State election,* at which such question may be submitted to the people of the State—and it does not appear in the present State Constitution of 1895 except as so amended. (Section 11, Article X.)

The then Supreme Court, in the case of Morton, Bliss & Co. *vs.* Comptroller General, 4 S. C., 430, (*Willard, A. J., delivering the opinon*), construing said Section 7 of Article IX of the State Constitution of 1868 as it originally stood held (at page 467) as follows:

"It must, therefore, be concluded that a vote of two-thirds of the members present at the time the vote was taken satisfies the requirements of the Constitution. The respondent's objections in this respect are not well taken."

And this decision was followed, it would seem *reluctantly* on this point, in the Bond Debt Cases (12 S. C., 200, at 285). In fact, judging from the language of the Court in the Bond Debt Cases in regard to the effect of the decision in the case of Morton, Bliss & Co. *vs.* Comptroller General, it would seem that, if this question had been *res integra,* a different conclusion would have been reached by the Court.

The decision, in the case of Morton, Bliss & Co. *vs.* Comptroller General, is certainly *res adjudicata* as to that particular case, and *stare decisis* as to other similar cases arising under the said Section 7 of Article IX of the State Constitution of 1868. But when it is sought, as in the case at bar, to extend and apply the questionable principles of that decision to another Section of the present State Constitution of 1895 (Sec. 23, Art. IV), solely because of the use in said Sec. 23, Art. IV, of language similar to that used in said Sec. 7, Art. IX, of the Constitution of 1868, this Court will be very cautious how it follows that decision—and, *if necessary,* this Court is now asked to review and overrule that decision.

The language of Sec. 23, Art. IV, of the State Constitution of 1895, is as follows:

* * * * "If after such reconsideration two-thirds of *that house* shall agree to pass it, it shall be sent, together with the objections, to the other house, by which it shall be reconsidered, and if approved by two-thirds of *that house* it shall have the same effect as if it had been signed by the Governor;" * * * * * * * *

The plaintiff in error contends that the said words "two-thirds of *that house*" should be construed to mean "two-thirds of ALL the members of that house"—while the defendant in error contends that they should be construed to mean "two-thirds of *a legal quorum* of that house."

Now, Mr. Justice Willard, in the case of *Morton, Bliss & Co. vs. Comptroller General,* very properly observes (at page 465) that *"the nature of the subject treated of"* is an important element to be considered in determining the signification of such words. To adopt his language (at page 464), *"the subject matter of this provision, namely,"* the re-consideration by the General Assembly of a Bill or Joint Resolution which has not been approved and signed by the Governor, *"is a matter clearly beyond the range of ordinary legislation, * * and there was manifest reason for requiring that a larger representation of local interests should take part in such action," etc.*

In matters of *"ordinary legislation"* there must be *three* readings on *three several days* in *each* house—*whereas* in the case of a Bill or Joint Resolution, which has not been approved and signed by the Governor but has been returned with his objections, ("a matter *clearly beyond the range of ordinary legislation*"), there can be only *one* reading or vote on only *one* day in each house.

"In acting upon so important a matter as overruling a veto of the Governor," it is, indeed, "better and safer that two-thirds of the whole number elected to the particular house should concur in the result."

Furthermore, in our careful investigation of the journals

of the General Assembly for the construction of such words (occurring in this or similar and other sections of the Constitution, as, for instance, Article III, Section 12, and Article IX, Section 2) by the President of the Senate and the Speaker of the House of Representatives, we have not found a single instance, other than this one, of a construction such as that contended for by the Defendant in Error—on the contrary, every ruling that we have been able to find, except in this one instance, is in accordance with the view contended for by the plaintiff in error—and *legislative construction* is of some force.

Moreover—if the contention of the defendant in error prevail, and the questionable principles of the decision in the case of *Morton, Bliss & Co. vs. Comptroller General* be extended and applied to sections of the present Constitution, solely because of the use of similar language, let us see to what it will lead, in one instance, at least.

The language used in Sec. 11, Art. III, of the Constitution, in fixing a quorum, is * * * "a majority of *each house* shall constitute *a quorum to do business*" * * *—which according to the contention of the defendent in error, must be construed to mean that "a majority of *a legal quorum* (not of ALL the members) of each house shall constitute *a quorum to do business*"! The *"legal quorum,"* a majority of which (it is said) shall constitute *"a quorum to do business,"* can then be none other than a general or common-law (so to speak) quorum, to-wit, a majority of ALL the members—for there are but two kinds of quorums, (1) a general or common-law (so to speak) quorum, and (2) a quorum fixed by some special authority, constitutional or otherwise—and it would be absurd to say and impossible that *"a quorum to do business"* should be a majority of *itself*.

The practical application of such a doctrine would have the following remarkable results:

(a) *Total membership of the Senate*..... 41
General or common-law (so to speak) quorum [a majority of ALL *the* members] 21
Constitutional *"quorum to do business"* [a majority of such general or common-law (so to speak) quorum] 11

Two-thirds of such Constitutional *"quorum to do business"* 8

Ergo, a Bill or Joint Resolution can be passed over the Governor's veto of it by *only eight* (8) out of *forty-one* (41) members of the Senate!

(b) *Total membership of the House of Representatives*.. 124
General or common-law (so to speak) quorum [a majority of ALL the members] 63
Constitutional *"quorum to do business"* [a majority of such general or common-law (so to speak) quorum] 32
Two-thirds of such Constitutional *"quorum to do business"* 22

Ergo, a Bill or Joint Resolution can be passed over the Governor's veto of it by *only twenty-two* (22) out of *one hundred and twenty-four* (124) members of the House of Representatives!

Even if the Constitutional *"quorum to do business"* were the same as, instead of a majority of, the general or common-law (so to speak) quorum, a Bill or Joint Resolution could under such doctrine be passed over the Governor's veto of it by *an actual minority* of ALL the members (in the Senate by 2-3 of 21, *i. e.* by 14, and in the House of Representatives by 2-3 of 63, *i. e.* by 42)—*whereas* the same Bill or Joint Resolution might have originally required a much larger vote (a *majority* of those present and voting) to pass each one of *three* readings on *three several* days in both houses.

If *all* the members of each house (41 of the Senate, and 124 of the House of Representatives) were present and voted, it would require *at least* 28 of the Senate (2-3 of 41) and *at least* 83 of the House of Representatives (2-3 of 124) to pass the Bill or Joint Resolution over the Governor's veto of it. And yet this Court is asked by the Defendant in Error to hold that only 14, or perhaps even 8, of the Senate, and only 42, or perhaps even 22, of the House of Representatives may be all that is necessary for such purpose, because, forsooth, the said figures are two-thirds of *"a legal quorum"* [*i. e.* a *"general or common-law, so to speak, quorum"*] of each house respective-

ly—in other words, to hold that the Constitution authorizes a *smaller* number (an *actual minority* of *the whole*) to do, at one time when a bare constitutional "*quorum to do business*" are present and vote, that which it prohibits a *larger* number (a *majority*, though not quite *two-thirds*, of *the whole*) from doing at another time when *the whole* are present and vote!

The language of the Constitution is "two-thirds of *that house*"—*not* "two-thirds of the members of that house *present and voting.*" There is, *therefore*, more reason for our contention that the words "that house" mean "ALL the members of that house" than there is for the contention of the Defendant in Error that the words "that house" should mean "*a legal quorum* of that house."

Because in some places the language is "two-thirds of the members *elected*," (as in Article XVI, Sections 1 and 3, *et al.*), it is contended by the Defendant in Error that, on the principal *expressio unius est exclusio alterius*, the language used here "two-thirds of that house" should be construed to mean two-thirds of *a majority* of that house— but the language in some other places is "the members *present and voting*," the argument from which, on the same principal, would lead to the opposite conclusion!

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(2). The said Section 23 of Article IV of the Constitution does *not* require the Governor to *send* a Bill or Joint Resolution, which he has not approved and signed, with his objections, to the house in which it originated for *consideration* by that house, &c—but it distinctly requires him to "RE*turn*" it for RE-*consideration*" by *both* houses, &c.

This Section also concludes as follows:

"If a Bill or Joint Resolution shall not be RE-*turned by* the Governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the General Assembly, by adjournment, prevents its RE-*turn*, in which case it shall

have such force and effect unless RE-*turned* with two days after the next meeting."

It must be noted that the Constitution of 1868 differs from the present Constitution in that it (the former) required the Governor to return such a Bill or Joint Resolution, "with his objections, to the house in which it shall have originated; which shall enter the objections at large on its Journals, and proceed to *consider* it" (not to RE-*consider* it, as the present Constitution requires)—*see* Sec. 22 of Article III of the Constitution of 1868 at page 134 of the Appendix to Volume II of "Code of Laws of South Carolina, 1902"—and also in that the said Section 22 of Article III of the Constitution of 1868 concludes as follows: * * * * * * "unless the General Assembly, by [*their*] adjournment, prevent its return, in which case it shall [*not*] have such force and effect unless returned within two days after [*their*] next meeting."

Ex necessitate rei, the "RE-*turn*" and "RE-*consideration*" must be to and by the *same, not a new,* General Asembly.

Ex ratione rei, the *same* General Assembly, that originally passed the Bill or Joint Resolution, must consider it, if it be not approved and signed by the Governor—otherwise it could not be said to have been "RE-*considered*"—a *new* General Assembly could not properly and understandingly deal with it. Only the *same* General Assembly, that originally passed it, could be so fully cognizant of its subject and of the reasons and arguments for and against it as to dispose of it by but *one* reading and vote.

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(3) The Senate immediately attempted to re-consider its first attempted action and vote on the 19th day of February, 1903—(see pages 12-3 of the Transcript of Record)—this, we respectfully submit, it could not do. Like a demurrer, it is exhaustive.

"The vote on the bill," (returned by the Governor, unapproved and unsigned by him, for reconsideration), "whether

in the affirmative or negative, does not admit of being reconsidered. But a new bill may be offered, if not otherwise objectionable."

Law and Practice of Legislative Assemblies by L. S. Cushing (9th Ed.), pages 924-5, paragraph 2388; and note 1, citing Journal of House, 27th Cong., 1st Sess., 1093, 1095, 1097, 1098, and Cong. Globe XIII, 672.

SECOND.

The second of the Assignment of Errors is as follows:

That the Supreme Court of the State of South Carolina erred in deciding that the said Joint Resolution became a law and took effect as such notwithstanding the use of the word "resolved," in its style instead of the word "enacted."

See the Joint Resolution at page 11 and page 18 of the Transcript of Record.

Section 16 of Article III of the Constitution of the State of South Carolina provides: "*The style of all laws* SHALL *be*: *'Be it* ENACTED *by the General Assembly of the State of South Carolina.'* "

The said so-called Joint Resolution reads: "Be it *Resolved,*" instead of "Be it *Enacted.*"

"The Constitution prescribes a formal enacting clause to precede statutes. *Held,* that an omission of such clause or a part of it rendered a statute void." (*Syllabus*). State vs. Rogers (10 Nevada, 250)—21 Am'n Reports, 738. Sjoberg vs. Security Savings and Loan Association (73 Minnesota, 203)—72 Am'n State Reports, 616.

And Section 29 of Article I of the Constitution of the

State prescribes that, "*The provisions of the Constitution shall be taken, deemed and construed to be* MANDATORY *and* PROHIBITORY, *and not merely* DIRECTORY, *except where expressly made directory or permissory by its own terms.*" The previous Constitution of 1868 had no such mandatory provision.

In spite of this *mandatory* provision, the Supreme Court of the State of South Carolina, though expressly saying "we are bound to hold it as *mandatory*," yet construe the said Article III, Section 16, in the light of decisions of other States, whose Constitutions have not a *mandatory* provision, *and*, therefore, practically hold it to be "merely *directory*"! See pages 20-1 of the Transcript of Record.

THIRD.

The third error assigned is as follows:

That the Supreme Court of the State of South Carolina erred in deciding that the said Joint Resolution does not impair the obligation of any contract and is not, therefore, repugnant to and in violation of either the "Federal" or the "State" Constitutions: It being submitted that said Joint Resolution did impair the obligation of the State's own contract, in that it tended to and did obliterate, invalidate and destroy the existence and validity of certain Bonds of said State, directed to be written and charged off under said Resolution; and obliterated, invalidated and destroyed the evidence as to the existence and continuing obligation of the same.

The said Joint Resolution of 1902 reads as follows:

"*A Joint Resolution to authorize and require the State Treasurer to write off of the books in his office certain bonds entered on said books as Old Bonds not Fundable* (*Act of* 1896), *Blue* [*Ridge*] *Railroad Bonds*, $37,000.

"BE IT RESOLVED by the General Assembly of the State of South Carolina:

"*Section* 1. That whereas, by an Act of the Legislature of 1896, the Treasurer of this State is forbidden to pay, con-

solidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds, and certain bonds entered on the books of the State Treasurer as 'Old Bonds not fundable (Act of 1896) Blue [Ridge] Railroad Bonds, $37,000,' are still carried on the books of the State Treasurer: Therefore, BE IT RESOLVED, That the State Treasurer be, and he is hereby, authorized and required *to write said bonds off of the books in his office, and no longer carry said bonds on the books* AS A DEBT OF THE "STATE." (*See* page 11 and page 18 of the Transcript of Record.)

This plain and unvarnished language of repudiation shows upon its face the repugnancy of the Joint Resolution to the *first* clause of Section 10 of Article I of the Constitution of the United States of America, which provides that "*No State shall * * * pass any * * * law impairing the obligation of contracts * * *,*" as well as to Section 8 of Article I of the Constitution of the State of South Carolina, which provides that "*No * * * law impairing the obligation of contracts * * * shall be passed * * **" --the Supreme Court of the State of South Carolina to the contrary in any wise notwithstanding.

The *opinion* of the Supreme Court of South Carolina (pages 24-5 of the Transcript of Record), is an argument in favor of the contention of the Plaintiff in Error—although the Court actually decides and holds that the writing off of the official books and record of the State Treasurer the bonds of the State in question, and directing him no longer to carry said bonds on his official books "*as a debt of the State*" (not as bonds unfundable by the Treasurer), is *a mere matter of book-keeping*! ! !

The facts of this matter are fully set forth in the abstract or statement of the case, *supra*—and in the "Application for Writ or Order of Injunction" by the Plaintiff in Error to the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of South Carolina, to be found at pages 1-14 of the Transcript of Record. And *all* the facts are admitted by the Demurrer of the Defendant in Error, to be found at pages 15-6 of the Transcript of Record. The

decision of the Supreme Court of the State of South Carolina is set out in full at pages 16-25 of the Transcript of Record.

The Executive of the State has from time to time recommended to the General Assembly for its consideration the payment of the bonds in question as necessary and expedient, under Section 15 of Article IV of the State Constitution of 1895. (*See* the Governor's Annual Messages of 1900 and 1901 and 1902, at pages 8-11 of the Transcript of Record, and his special message of January 13, 1903, sending the Joint Resolution, unapproved by him, back to the Senate, at page 12 of the Transcript of Record).

And *the Judiciary* of the State have likewise expressed their absolute opinions as to the *bona fides* and justice and merits of the claim of the Plaintiff in Error, and have decided that the bonds in question *"are the property of the President, Directors and Company of the State Bank, and that the Receiver of the said Corporation is the only person entitled to fund and collect the same from the Treasurer of the State."* (*See* "Fourth" at pages 4-6 of the Transcript of Record—and the case of Lord, Receiver, *vs.* Bates, Treasurer, referred to and quoted, and reported at page 95 *et seq.* of Volume 48 of South Carolina Reports, especially the opinion of the Court by Mr. Justice Gary at page 96, and the concurring opinion of Mr. Chief Justice McIver at page 110, and the dissenting opinions of Mr. Justice Jones at page 113 and of Judge Earle at page 117).

But *the General Assembly* of the State, disregarding and ignoring the recommendations of the Executive and the opinions and decisions of the Judiciary, and bent upon its evident policy of obliteration and repudiation of this just and lawful debt of the State by refusing to pay, fund, convert or consolidate the said bonds of the State, and finally by directing them to be written off of and no longer carried on the books and record of the State *"as a debt of the State,"* (not as bonds unfundable by the Treasurer), deliberately and flagrantly passed the said repudiatory Joint Resolution, which is now before this Honorable Court under the Writ of Error herein.

(*See* "Seventh" at page 7 and also page 11 of the Transcript of Record.)

Attention is directed to the fact that the Act of 1896, forbidding the consolidation, conversion, funding or payment BY THE TREASURER of any coupon bond of the State or coupon thereof after the expiration of twenty years from the date of maturity of such bonds, (which is set out in full under the head of "Sixth" at page 7 of the Transcript of Record, and which is referred to incidentally in the last paragraph of the opinion of the Supreme Court of South Carolina at page 25 of the Transcript of Record), was passed *ex abundanti cautelâ* as a legislative supplement to the previous judicial orders of injunction restraining the State Treasurer from consolidating, converting, funding or paying the bonds in question, so that after the expiration of twenty years from date of maturity there could no longer be any fear that the bonds in question might possibly be presented to the State Treasurer by any one claiming to hold and own them other than the Plaintiff in Error and be by the State Treasurer consolidated, converted, funded and paid, and thus that they might be *twice* consolidated, converted, funded and paid. When, however, after the expiration of twenty years from the date of maturity of the bonds in question (there being no longer any such fear as aforesaid) application was confidently made by the Plaintiff in Error under direction of the Court to *the General Assembly* for consolidation, conversion, funding and payment of the bonds in question, which had been owned by the State Bank *ab initio* and payment of which had been so long deferred, the General Assembly instead of "bread" gave "a stone," and, while arbitrarily refusing to make any provision for these bonds, went even further and passed the said repudiatory Joint Resolution. (*See* "Seventh" at page 7, and also page 11 of the Transcript of Record).

The bonds in question have been for a long time and are "lost or destroyed," and *evidence* of them is their entry on the State's books and record in the Treasury of the State—which *evidence* the said Joint Resolution seeks to destroy and obliterate and wipe out, to the invalidating of the State's debt, and the impairment of her own contract and the great

damage of the Plaintiff in Error and those represented by him.

The policy and rule of the United States and many of the States is to re-issue new bonds for lost or destroyed bonds, under general laws—Sec. 3072 of the U. S. Revised Statutes, pages 186 of the Public Laws of 1882 of Massachusetts, Sec. 952-3 of the Code of Georgia, etc. But there is no such general law in South Carolina, so that in each instance special application must be made to the General Assembly—there is no other recourse or remedy. And the General Assembly of South Carolina has heretofore, in many instances, provided by special Acts or Joint Resolutions for re-issue of new bonds in place of lost or destroyed bonds of the State—but unjustly refuses to do so in *this* instance, and seeks by means of said Joint Resolution of 1902 to repudiate *this* debt.

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(1) The obligation of States, which issue negotiable paper, is the same as that of individuals or corporations in like case.

"The prohibitory clause of the Federal Constitution, protecting the obligation of contracts from impairment, applies equally to all classes of contractual engagements, including those to which the State itself is a party, and whether the other party be one of its individual citizens, or a corporation, or another State."

3 Am'n & Eng. Encyclopædia of Law (1st Ed. 1887), p. 748.

15 Am'n & Eng. Encyclopædia of Law (2nd Ed. 1900), p. 1033 (paragraph 6), and pp. 1040-1 (subdivision IV), and pp. 1047-8 (paragraph 2).

Cooley's Constitutional Limitations (6th Ed.), pp. 329-30.

See also Morton, Bliss & Co. *vs.* Comptroller General, 4 So. Ca. Rep., p. 430, at pp. 448-9; Bond Debt Cases, 12 So. Ca. Rep., p. 200, at p. 272; Provi-

dence Bank *vs.* Billings, 4 Pet., 514, at 560; Fletcher *vs.* Peck, 6 Cranch, 87, 136; Murray *vs.* Charleston, 96 U. S., 432, at 445; Hartman *vs.* Greenhow, 102 U. S. 672; *et cetera.*

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(2) Almost all of the authorities (and there are very many) relate to the remedy, *i. e.* the means of enforcing a contract, but we are fortunately saved the trouble of discussing this intricate question in this case, except as to the single matter of *evidence*, because the impairment in this case is of the very contract itself — open and rank repudiation — the State Treasurer being authorized *and required* by the said so-called Joint Resolution not only *"to write said bonds off of the books in his office,"* but also to *"no longer carry said bonds on the books* AS A DEBT OF THE STATE" (not as bonds unfundable by the Treasurer).

In the case of *Calhoun vs. Calhoun*, 2 So. Ca. Rep., p. 283, at p. 301, Mr. Chief Justice Moses, in delivering the opinion of the Court, says:

"In the many interesting cases which are to be found in the Reports, in which this important provision of the Constitution of the United States is brought into discussion, we have not found, in our investigation, a single one where the question arose upon the entire destruction of the contract, so declared in express terms by State authority. Where it is attempted to expunge the whole contract, to make it 'null and void,' it would be a waste of words to enquire if the obligation is impaired. The cases almost exclusively relate to the effect on the obligation of the contract, through the remedy by which it is to be enforced."

And here we might rest our case and stop.

"By the manifest and necessary effect of the legislation, the creditor is reduced to the condition, in which (as has been elsewhere said) *'his rights live but in grace, and his remedies in entreaty only.'*"

The State *vs.* Carew, 12 Rich. Eq. and 13 Rich. L.,

498, at 520; and Curran *vs.* State of Arkansas, 15 Howard (U. S.), 304, at 320.

"In this view, the statute can only be regarded as *an assertion of a proprietary claim to the fund,* and, as such, we have seen that the appropriate tribunal before whom that claim should be asserted is the Court of Chancery that has possession of the fund" (*Willard, A. J., at page* 73,)—and, "The assets of the bank are all that is left to meet the debts of the corporation, and, *if they are taken by the State from the hands of those who hold the title for the purposes designed by the charter,* and who are amenable to suit, where is the remedy which the creditor held in his right of action?" (*Moses, C. J., at page* 76.)

The State vs. The Bank of the State of South Carolina, 1 So. Ca. Rep. (New Series), 63.

"On the dissolution of a corporation, its effects are a trust fund for the payment of its creditors, who may follow them into the hands of anyone, not a *bona fide* creditor, or purchaser without notice; and a State law, which deprives creditors of this right, and *appropriates the property to other uses,* impairs the obligation of their contracts, and is invalid" (*Syllabus*)— * * * "and, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or *seizing it to the use of the State,* would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." (*Curtis, J., at page* 312).

Curran vs. State of Arkansas, 15 *Howard, (U. S.),* 304.

Is not the effect of the said so-called Joint Resolution *"an assertion of a proprietory claim to the fund"* by the State —a taking of the assets of the Bank *"by the State from the hands of those who hold the title for the purposes designed by the charter"*—an appropriation by the State of *"the property*

to other uses" (*her own* use, or benefit and advantage, by the obliteration or expunging of the *evidence* of the debt from her books)—or a *"seizing it to the use of the State"*?

See, also, *Rutland vs. Copes*, 15 Rich L., 84, at 116-7—*Duke vs. County of Williamsburg*, 21 So. Ca., 414, at 419-20—*Wilkinson vs. Leland*, 2 Pet., 627—*Sturges vs. Crowninshield*, 4 Wheat., 122 (Marshall, C. J.)—*Planters' Bank vs. Sharp*, 6 *How.*, 301, at 327.

"If the government will not keep its faith, little better can be expected from the citizen. If contracts are not observed, no property will in the end be respected; and all history shows that rights of person are unsafe when property is insecure. Protection to one goes with protection to the other, and there can be neither prosperity nor progress where this foundation of all just government is unsettled. *Sinking Fund Cases*, 99 U .S., 700, 767." LOUISIANA *vs.* JUMEL, 107 U. S., 711, at 740. (Field, J.)

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(3) Not only is the very contract itself impaired by the said so-called Joint Resolution, as shewn above, but also is its obligation materially and prejudicially affected by a remedial alteration, that is to say, by the attempted obliteration of the *evidence* of the debt on the books of the State, upon which *evidence* the Plaintiff in Error and the creditors of the Bank, whom he represents, must rely (the original and primary evidence of the debt, *the very bonds themselves*, having been "lost or destroyed")—*see* page 7, of the Transcript of Record.

While there is no vested right in Rules of Evidence, and such *Rules* may be *changed* as *relating to the remedy only*, yet the very *Evidence* itself cannot be *obliterated—annulment* of the very *Evidence* itself is wholly different from *change* of its *Rules*.

See 15 *American and English Encyclopædia of Law* (2nd Ed. 1900), pages 1050-1 (paragraph 6)—also, §§ 483, 484 and 493 of *Greenleaf on Evidence*, (13th Ed.), Vol. 1; *Ed-*

wards vs. Kearzey, 96 U. S., 595; and *McGahey vs. Virginia*, 135 U. S., 662.

"It is thus most apparent that, which ever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or *the evidence or remedy* to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second."

Ogden vs. Saunders, 12 Wheaton's Rep., 213, at 262 (*Washington, J.*)

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. *Any deviation* from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, *however minute or apparently immaterial in their effect upon the contract of the parties*, impairs its obligation." GREEN *vs.* BIDDLE, 8 Wheat., 1, at 84.

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired *at all*. This is not a question of *degree* or *manner* or *cause*, but of encroaching *in any respect* on its obligation, dispensing with *any part* of its force." PLANTERS' BANK *vs.* SHARP, 6 How., 301, at 327.

"The obligation of a contract includes *every thing* within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. Want of right and want of remedy are the same thing." 1 *Bac., Abr., tit, Actions in General, letter B.*" EDWARDS *vs.* KEARZEY, 96 U. S., 595, at 600.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. *Whatever legislation* lessens the efficacy of these means impairs the obligation." LOUISIANA *vs.* NEW ORLEANS, 102 U. S., 203, at 206-7.

"Statutes passed against the plain and obvious principles of common right and common reason are null and void as far as they are opposed to such principles." Ham *qui tam vs.* M'Claws and wife, 1 Bay, 93.

It is asserted that the said so-called Joint Resolution "is merely a direction to the State Treasurer as to a question of book-keeping and does not, therefore, impair the obligation of a contract"—but to the Plaintiff in Error and the creditors of the Bank, whom he represents, it is a matter of supreme and vital consequence, as a practical repudiation and wiping out of the State's debt to them.

FOURTH.

The fourth error assigned is as follows:

That the Supreme Court of the State of South Carolina erred in refusing the injunction prayed for and in revoking the temporary restraining order theretofore granted and in dismissing the petition of the said Henry A. M. Smith as Receiver as aforesaid.

If the other errors assigned and discussed above, or any of them, be sustained, then this error follows as of course—it is the sum of the whole matter, and needs no further discussion.

Manifest error having, therefore, happened to the great damage of the Plaintiff in Error, and of all others by him represented, as above shown, it is asked of this honorable Court that such error be duly corrected and full and speedy justice done in this behalf.

T. W. BACOT,
Attorney of the Plaintiff in Error.
A. M. LEE, and
JULIAN MITCHELL, Jr.,
Of Counsel.

(Over)

Communication, stating the case, sent to all the members of the General Assembly of the State of South Carolina on the eve of application by the plaintiff in error for consolidation and funding and payment by the General Assembly of the State Bonds in question.

CHARLESTON, S. C., 15th December, 1902.

DEAR SIR:—His Excellency, the Governor, in his annual message to the General Assembly in 1900, called the attention of the two Houses to the matter of certain lost bonds of the State, claimed by the late private corporation known as the State Bank, and adjudged by the Courts of the State to belong to that corporation; and he recommended that the Receiver of the Bank be allowed to fund them. He thus stated the case:

"The Treasurer of the State" (then Hon. W. H. Timmerman) "has called my attention to the fact that there are a number of old bonds which have hitherto been reported as fundable but which under the Act of 1896 are now no longer so, and among them are the bonds claimed by the State Bank (Blue Ridge Railroad Bonds of 1859) to the amount of $37,000. The Act of 1896, referred to, prohibits the State Treasurer from funding or paying any bonds after the expiration of twenty years from the date of maturity. The bonds above mentioned matured on July 1st, 1879, and the twenty years limitation expired on July 1st, 1899.

"These bonds it may be recollected have been the subject of several applications to the General Assembly for permission to fund them without the surrender of the bonds themselves. One hundred thousand of these bonds were, it is alleged, plundered and taken from the Bank in February, 1865, by the Federal troops in their march through the State. They have from that time been constantly claimed by the Bank, the Receiver of which obtained an injunction from the Courts as early as 1870 restraining the Treasurer of the State from paying principal or interest of any of them to any one but the Receiver, and under that injunction all of these bonds but the thirty-seven now remaining upon the Treasurer's books have from time to time been recovered by the Receiver of the Bank and by him funded. No one has during the thirty years since the injunction has been in force claimed the bonds in question, and the Courts of the State have declared that they are the property of the State Bank and that the Receiver of the Bank is the only person entitled to fund and collect them from the Treasurer of the State.

"The State owes these bonds to some one, and the objection which the General Assembly has hitherto had to the funding of them has been it is understood the fear that some one might still produce and present them to the Treasurer for funding under the funding Acts of the State, and that the State might in this way have to pay them twice. This objection seems now removed, as

no one but the Receiver of the Bank has the right to ask to have them funded, all other persons being now barred by the Statute from applying to the Treasurer for that purpose. But however this may be, some action must now be taken in regard to them. They can no longer be carried on the books of the Treasurer as bonds fundable. It rests with the General Assembly to say what must be done in the matter."

His Excellency again alluded to this subject in his annual message in 1901, again urging action in regard to it, and recommending the settlement of these bonds by allowing the Receiver of the State Bank to fund them. And yet again in his annual message last year (1902) he thus addressed the General Assembly:

"In my messages of the last two years I have upon each occasion called your attention to the subject of certain bonds, which by the Treasurer's reports appear as part of the old debt of the State, but which are now under the Act of 1896 no longer fundable by the Treasurer without the action of your honorable bodies. From your journals I learn that my message upon the subject was referred to a joint committee which reported thereon, but which report was not adopted by the Senate and no action taken thereon by the House of Representatives. The Treasurer" (the Hon. R. H. Jennings) "calls attention to these bonds and says: 'I find on the books of this department certain bonds as part of the debt of the State, entered as Old Bonds Not Fundable (Act of 1896) Blue Ridge Railroad Bonds $37,000. These bonds were issued in 1859 and matured in 1879. By the Act of 1896 the Treasurer is forbidden to pay, consolidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds. I am in doubt as to how longer to report these bonds. If they are no longer fundable, why carry them longer as a part of the debt of the State? But while on the one hand the Treasurer can neither pay nor fund them, on the other he has no authority to write them off the books.' This letter was referred to the Attorney General for his opinion, and in reply he submits a full and complete opinion concluding as follows: *'I am of opinion that the bonds in question constitute an existing adjudicated part of the debt of the State and as such can only be disposed of by some Act of the Legislature.'* *

"Thus confirmed in my opinion and views upon the subject by the legal officer of the State, I cannot do otherwise than repeat my recommendation of last year, viz.: that the claim of the Bank to be permitted to renew and fund these bonds is valid and just and should be allowed. It is not denied that the State owes the bonds to some one. They are carried as part of the debt of the State on the books of the Treasurer, as owing to some

one. The Courts have all decreed the Bank to be the owner; no one else can now claim them, as all persons but the Bank are barred under the Act of 1896 from doing so. *I repeat, in the face of these facts, it will be little short of repudiation if we continue to refuse to allow the Receiver of the Bank to fund them."* *

The opinion of the Attorney General referred to and quoted by his Excellency is attached hereto as an appendix, and attention thereto is particularly requested.

In response to this earnest message of the Governor, the last Legislature in opposition thereto, after a vigorous resistance by a minority, passed the following Joint Resolution:

"Be it resolved by the General Assembly of the State of South Carolina:

"Section 1. That whereas by an Act of the Legislature of 1896 the Treasurer of the State is forbidden to pay, consolidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds, and certain bonds entered on the books of the State Treasurer as 'Old bonds not fundable (Act of 1896) Blue Ridge Railroad Bonds $37,000' are still carried on the books of the State Treasurer, therefore be it

Resolved, That the State Treasurer be and he is hereby required to write said bonds off the books as a debt of the State."

His Excellency, the Governor, doubting whether this Joint Resolution or Act did not come within the prohibition of the Constitution of the United States in regard to the impairment of contracts, submitted the same to the Attorney General, who gave his opinion that it did not do so inasmuch as it did not affect the rights of the parties. He says:

"As to 'what effect it would have', if approved, I am of opinion that it can have no legal effect upon the parties claiming any right in the bonds, nor does it preclude them from petitioning the Legislature for relief."

Upon receiving this opinion, his Excellency has announced in the public prints his intention of vetoing the Resolution. He says:

"In view of the position I have taken all along that the bonds on the books of the State Treasurer as 'old bonds not fundable,

*Italics ours.

Act of 1896, Blue Ridge Bonds $37,000' constitute a valid debt against the State and should be paid to some one, I cannot approve the Joint Resolution authorizing and requiring the State Treasurer to write off his books these bonds. I understand that from the opinion of the Attorney General this Resolution is not unconstitutional, and, further, that the entry on the State Treasurer's books constitute no part of the contract, and that such Act could have no legal effect upon the parties claiming any rights in the bonds nor would it preclude them from again petitioning the Legislature for relief. Still, in my opinion, it would have the appearance of repudiation, and, as it has no legal effect upon the parties, I can see no good to be accomplished by the Resolution and therefore will not approve it."

This Joint Resolution was passed on the last day of the Session of the Legislature of 1902, too late for the Governor to return it with his objection at that Session, and thus under the provision of the Constitution it goes over and will be returned to the Senate, in which body it originated, at the opening of the new General Assembly of 1903. The whole subject will thus be opened again, and will call for discussion and action by the new Legislature.

The undersigned, the Receiver of the State Bank and the Attorneys of the creditors of the Bank, assured of the absolute justice of the claim they represent—(a claim, upon which the Attorney General, the law officer of the State, has given it as his official opinion that it constitutes "*an existing and adjudicated part of the debt of the State*;" a claim, which the highest Courts of the State have recognized as legitimate and binding upon it, and to which his Excellency, the Governor, has so earnestly and repeatedly called attention, urging upon the Legislature its duty to meet and provide for the same)—take this method of laying before you in advance a statement of the case upon which your action will be required very soon after the meeting of the General Assembly in January, 1903.

THE CASE.

The Case is this:—In February, 1865, the assets of the State Bank (a private corporation, not the State institution known as "The Bank of the State") were plundered and rifled and stolen by the Federal troops on Sherman's march through the State. Among the assets of the Bank were 100 bonds of the State of $1,000 each, issued under Act of 1854 in aid of the Blue Ridge Railroad Company, for which the Bank had subscribed and paid in gold at not less than par. Immediately upon the reopening of communications, *i.e.* in July, 1865, the President of the Bank gave notice to the Treasurer of the State warning him not to pay these bonds to any one presenting them.

THE STATE TAKES POSSESSION OF REMAINING ASSETS OF BANK AND PUTS IT IN LIQUIDATION.

In 1869 an Act was passed requiring the old banks which had suspended because of their losses during the war to resume business or go into liquidation (*Statutes, Vol. 14, p. 212*), and under this Act the Attorney General, in 1870, upon the demand of the Comptroller General, had a Receiver appointed for the said State Bank, who took possession of its remaining assets and assumed the duty of winding up its affairs. Among the assets of the Bank were these lost bonds, the subject of which was thus taken charge of by the State in a case instituted by the State, to which case the creditors, whom the undersigned attorneys now represent, were called in and made parties by the State, and under which call of the State they proved their claims. The case is thus not one of an ordinary creditor's suit between private parties, but a case of the State itself instituted under an Act of the Legislature. We are thus particular in emphasizing this fact in the outset, as it at once meets and refutes in advance the charge insinuated that the case is one trumped up by lawyers on a speculation.

TREASURER ENJOINED AT INSTANCE OF STATE FROM PAYING EITHER PRINCIPAL OR INTEREST OF THESE BONDS EXCEPT UNDER ORDER OF COURT.

Prior to the State's Receiver taking possession, the Bank had recovered nineteen of the bonds, and upon the motion of the Attorney General on the 20th of April, 1870, an injunction was issued by the Courts enjoining the Treasurer of the State from paying any person either principal or interest of any of the remaining eighty-one of these lost bonds except under order of the Court, and calling upon all persons claiming any of them to come in and prove their ownership. This injunction, posted in the Treasurer's office, has remained in force from that day to this, and none of the bonds (unless accidentally) have been paid or funded except under order of the Court. Advertisements have been repeatedly made calling upon any persons holding or claiming any of these bonds to come in and prove their ownership.

BONDS RECOVERED AND THEIR DISPOSITION.

Under these proceedings sixty-two, *i. e.*, all but *thirty-eight*,* of these one hundred bonds of the State Bank have been from to time recovered and funded under orders of Court. The proceeds of all but *five* of the sixty-two bonds so recovered and funded have, under a decree of the Court, been appropriated to the payment of the Royal Bank of Liverpool, which was adjudged to have had a first lien upon them. (*See Garvin vs. State Bank, 7 So. Ca. Rep., 266.*) The proceeds of the *five*

*NOTE.—The discrepancy between the number of bonds carried on the books of the Treasurer, *to wit*, 37, and the number found by the Court to be due and owing to the State Bank, *to wit*, 38, was fully examined into by the Committee of the House in 1896. It arose, the Committee found, from some clerical error in entries on the Treasurer's books, and the experts employed by that Committee found that not one of the 38 bonds claimed by the Bank had been funded or paid. (*See Journal of the House 1896, pp. 55-63.*)

have been paid to certain other lien creditors of the Bank upon account. The *foreign* creditors of the Bank have thus been paid in full, leaving the creditors *in this State* unpaid, whose only hope of payment even in part is in the funding of these *thirty-eight* bonds to which they have been adjudged entitled.

DECREE OF THE COURT DECLARING THE BANK THE OWNER OF THE REMAINING BONDS, AND THE RECEIVER THE ONLY PERSON ENTITLED TO FUND THEM.

The Treasurer of the State having in 1894 suggested that possibly some of these bonds might have been fraudulently funded during the Radical administration, supplemental proceedings were had in the State Courts to which the State Treasurer was a party represented by the Attorney General. The case was referred to William Gibbes Whaley, Esquire, Master in Equity, and references held in Columbia, at which the most rigid investigation was instituted, resulting in a report of the Master, as follows, to wit:

"I find as a matter of fact from the records in this case and the testimony taken by me, that the thirty-eight bonds above mentioned and numbered, included in the order of injunction of the 20th of April, 1870, are still outstanding, unfunded and unpaid. * * *

"In conclusion I find and report:

"1. That thirty-eight (38) coupon bonds, issued in aid of the Blue Ridge Railroad under the Act of 1854, the same being a part of those mentioned in the order of injunction of 20th April, 1870, and numbered respectively" (here the bonds are specifically enumerated), "are still outstanding and unpaid.

"2. That the said bonds are the property of the late corporation known as the President, Directors and Company of the State Bank, and that the Receiver of the said corporation is the only person entitled to fund and collect the same from the Treasury of the State."

Upon the coming in of this report the case was heard by his Honor, Judge Witherspoon—Mr. Edward McCrady appearing for the plaintiffs, and the Hon. O. W. Buchanan, Attorney General, for the State Treasurer, defendant—and,

thereupon, his Honor, Judge Witherspoon, presiding in the first Circuit, on the 21st August, 1894, adjudged and decreed:

"1. It is ordered that the same" (the Report) "be confirmed as hereinafter directed.

"2. And it appearing therefrom that the matter of the ownership of the bonds of the State of South Carolina, mentioned in the order of the 20th April, 1870, in the original proceedings in this cause, to wit, that of *Garvin vs. State Bank*, has already in effect been passed upon by the previous orders of this Court enjoining the payment or funding of the same to any or by any other person than the Receiver of the said Bank, and directing the distribution of the proceeds thereof among the creditors of the said corporation in the manner therein mentioned—*I further find that the said bonds, so claimed in the supplemental complaint and found in the said Report to be outstanding and unfunded"* (here follows a specific enumeration of the said bonds), *"are the property of the President, Directors and Company of the State Bank, and that the Receiver of the said corporation is the only person entitled to fund and collect the same from the Treasurer of the State."*

SENATE UNANIMOUSLY PASSES JOINT RESOLUTION TO ALLOW RECEIVER TO FUND THE BONDS.

The Bank having thus been formally adjudged and decreed the owner of the bonds, and the Receiver the only person entitled to fund them, Mr. Samuel Lord, the then Receiver, under the order and direction of the Court of the 13th October, 1894, his Honor, Judge Ernest Gary presiding, presented a memorial to the General Assembly, which met in November, 1894, praying to be allowed to fund the bonds in question under the funding Acts, and, upon presentation of the same, the Senate on the 7th December, 1894, passed without a dissenting voice a joint Resolution for the purpose. (*See Journal of the Senate, December 7th, 1894.*)

ACTION OF THE HOUSE THEREON.

This Senate Resolution going over to the House was favorably reported upon by the Judiciary Committee of that

body, but was continued until the next Session and in the meantime referred to a special committee of three to make a still further investigation and to re-examine the State Treasurer's office, the books and the vouchers and records thereof, to be assured again that the bonds had not been funded. (*See Journal of the House, December 20, 1894.*) The committee appointed under this Resolution employed two experts, chosen by the Treasurer of the State, who, under his immediate supervision, made another thorough investigation of the books and vouchers in the Treasurer's office. The committee reported by a majority (*House Journal, January 15, 1896*)

1. *"That the bonds in question have not been funded, and are outstanding and a legitimate debt of the State.*
2. *"That the said bonds belong to the State Bank, and that the Receiver of the said corporation, Mr. Samuel Lord, is the only person entitled to fund and collect the same."*

Notwithstanding this favorable report, however, the House failed to pass the joint Resolution upon the ground, as it was generally understood, that, notwithstanding the proceedings in Court and the injunction, as there was no Statute restricting the time when the bonds might be funded, some holder might yet appear, claiming that he was an innocent purchaser without notice of wrong, and thereupon the State might again be called upon to pay.

THE ACT OF 1896.

To meet this, the General Assembly at that Session passed an Act limiting the time in which the Treasurer might fund bonds, without the special action of the Legislature, to twenty years after the date of maturity. (*See Statute of 1896-183.*) And, as the Governor has pointed out, the bonds in this case having been issued in 1859 and having matured in 1879 and the twenty years after maturity having expired in 1899, no one else but the Bank can now claim them and all others are barred from setting up any claim whatever to them. The Attorney General has given it as his official opinion that the Act cannot apply to the claim of the Bank

as that was presented and has been continuously pressed and reduced to judgment before the passage of that Act. Indeed, as was urged at the time, the Act would protect the right of the Bank from any other persons who might thereafter claim the bonds, and it was passed as much in the interest of the Bank as of the State. It was said in debate, let Mr. Lord wait till the twenty years have expired.

THE HIGHEST COURTS AND ALL THE JUDGES IN THE STATE APPROVE THE CLAIM OF THE BANK.

It having been suggested that, under the decree of his Honor, Judge Witherspoon, adjudging the lost bonds the property of the State Bank and the Receiver of the Bank the only person entitled to fund and collect them (as in the ordinary case of a lost note or bond or other chose in action between private persons, the debtor in which case is, upon proof of loss, compelled to pay, though the note or bond is not produced), the Receiver was entitled to have these lost bonds funded by the Treasurer without further action on the part of the General Assembly—Mr. Lord, the Receiver, with the sanction of the Circuit Court, petitioned the Supreme Court of the State in the exercise of its original jurisdiction to issue a Writ of *Mandamus* to require the Treasurer to fund the said 38 bonds accordingly.

The case thus made was first argued before the Supreme Court on the 18th May, 1896, when that Court was so impressed with the seriousness of the question that all the Circuit Judges were called in under the provision of the Constitution of the State and a re-argument was ordered before all the Judges sitting *en banc*. On the 30th May the re-argument took place before the Court of all the Judges, and it appears from the Report of the case (*Lord, Receiver, vs. Bates, 48 So. Ca. Rep. 95*) that upon the hearing FOUR of the Judges—two of the Supreme Court and two of the Circuit—were of opinion that the Receiver was entitled to the *mandamus* to require the Treasurer to fund the bonds without further action of the Legislature. *The Court was unani-*

mons, it appears, that under the decree of Judge Witherspoon the question of the ownership of the bonds had been finally settled. Ultimately, however, all but two of the Judges came to the conclusion that it was not sufficiently clear that the Treasurer had authority under the funding Acts to fund *lost or destroyed* bonds without a special Act of the Legislature authorizing him to do so, and that relief could thus only be obtained by special action of the Legislature.

On the 7th of January, 1897, his Honor, Judge Benet, passed an order in the Circuit Court reciting that, though the majority of the Court, consisting of all the Judges, had refused the Mandamus as above, yet they *all* were, in the language of the Chief Justice, "fully convinced of the justice of the Relator's" (*i. e.* the Receiver's) "claim to the bonds which he is seeking to have funded." Continuing, his Honor ordered as follows: "The whole Court, including the Circuit Judges of the State who were called in under the provision of the Constitution to hear the cause *en banc*, as well as the members of the Supreme Court, uniting thus in opinion as to the merits of the claim of the Receiver to the funding of the bonds, to wit, that that point has been finally adjudged in his favor; but differing only as to his right to have the same funded without further action on the part of the General Assembly—*it is, therefore, ordered that the Receiver be authorized and instructed to again memorialize the General Assembly upon the subject.*"

In his annual messages of 1900, 1901 and 1902, his Excellency, as we have before observed, has again and again urged upon the General Assembly the duty of recognizing and providing for the funding of these bonds. The Hon. O. W. Buchanan, as Attorney General, accepted and approved the decree of Judge Witherspoon as just and right, and the present Attorney General, the Hon. G. Duncan Bellinger, has given his opinion that "*the bonds in question constitute an existing adjudicated part of the debt of the State.*"

Hon. W. T. C. Bates, who, when Treasurer, required a full investigation of the question of these bonds, has declared himself satisfied as to them; and both the late Treasurer,

the Hon. W. H. Timmerman, and Hon. R. H. Jennings, the present Treasurer, have recognized this claim as just and right.

As the matter now stands:

1. *The bonds in question form a part of the recognized legitimate debt of the State, due to some one, as appears from the books of the Treasurer, though the same are not fundable by the Treasurer without a special Act of the Legislature.*

2. *The Courts have adjudged and decreed that the State Bank is the owner of these bonds, and that the Receiver is the only person entitled to fund them.*

3. *All other persons but the Receiver of the State Bank are now barred from setting up any claim to them.*

ANSWERS TO OBJECTIONS RAISED.

The objections which have been urged against this claim are as follows:

1. *That the bonds are themselves barred by the Act of 1896, prohibiting the Treasurer from funding any bonds after twenty years from maturity.*

This objection is answered by the opinion of the Attorney General. He says:

"The Treasurer calls attention to the Act of 1896, limiting the time in which bonds may be funded. (Statutes, Vol. XXII, 183.) This Act forbids the Treasurer from funding or paying bonds after the expiration of twenty years from the maturity of such bonds. The bonds in question it appears were issued in 1859 and matured in 1879, and so in 1899 fell under the Act of 1896. But the State is not bound by any Act of limitation, nor does this Act purport to be such. It forbids *the Treasurer* to pay or fund; it does not and cannot control *the State itself* any more than any other Act which may be repealed or modified by the Legislature at its pleasure. *But even was this Act to be regarded as a Statute of Limitation, it could have no application to the case*

in question in which the claim of the State Bank for these bonds has now been before the Courts and Legislature for thirty odd years, and that at the instance of the State itself."

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2. *That notwithstanding the decree of the Courts adjudging the Bank the owner of the bonds, and the Receiver the only person entitled to fund them, still some one might come in and claim them.*

This objection, as the Governor has pointed out, has been fully met by the Act of 1896. No one but the Bank can now claim them, nor would any one else be recognized if he did so.

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3. *That the claim is for a war loss, and should not be recognized.*

The answer to this is, *first*, that the State should surely do itself what it has compelled its citizens to do in similar circumstances; that it has compelled its citizens to pay all notes and bonds, etc., lost during the war, and by special legislation has provided an easy method of proving such lost instruments. One of the first Acts passed by our own Legislature after the war, to wit: on the 21st December, 1865, was one "*to provide a mode by which to perpetuate testimony in relation to deeds, wills, choses in action*" (*i. e. bonds, notes, etc.,*) "*and other papers and records destroyed or lost during the recent war.*" (Statutes, Vol. XIII, 345.) By this Act a summary method was provided for the proof of such lost instruments, and that by secondary evidence; and upon such proceedings the State required the private debtor to pay the debt, notwithstanding the loss of the note or bond upon which it was due. The requirements of this Act have been fully complied with in this case. Will the State not now itself do what it has required private debtors under like circumstances to do? If among the records of the State destroyed during the war there had been a bond or note of a citizen due the State, would not the State have compelled its citizen debtor to pay it, and have

scorned the idea that the citizen debtor was released by reason of her loss of the evidence of his indebtedness? Will the State have one law of justice for its citizens and another for itself?

THE STATE HAS IN OTHER CASES ACTED UPON NO SUCH UNJUST RULE.

In numerous instances the State has recognized the justice of meeting her obligations, the evidences of which had been lost during the war. By the list or table in the Appendix hereto annexed, *to which very careful attention is earnestly asked*, it will be seen that since the year 1877, when our people recovered the government of the State, the General Assembly has passed a large number of Joint Resolutions or Acts renewing and funding bonds and stock, alleged to have been "*lost or destroyed*" or to have been "*destroyed*," to an aggregate of $155,121.67—of which $98,000 were of the very same class of bonds we are now asking to be allowed to fund, *to wit*, bonds issued under Act of 1854 in aid of the Blue Ridge Railroad Company. It is to be observed that in none of the above cases were the facts *judicially* inquired into, but that in each the General Assembly acted upon the representations of the petitioner to the Committee, while in this case the facts have undergone *judicial* scrutiny and *expert* investigation. Will the State refuse to do for these claimants, after the fullest investigation, what it has done for others without such scrutiny?

THE STATE HAS CONTINUOUSLY COLLECTED TAXES TO PAY THE INTEREST ON THESE BONDS.

There is still another reason why the State should not shield itself behind the cry that this was but a war loss, and that is, that not only does the State recognize these bonds as part of its legitimate debt, and as such due to some one, but that during all these years while we have been claiming them the State has annually levied and appropriated a sum

to meet the interest upon them in case the bonds themselves should be presented. The tax payers have thus already paid into the Treasury the amount necessary to meet the interest upon these very same *thirty-eight* bonds. Allowing us to fund these bonds (i. e. to receive new bonds for them under the funding Acts) will, therefore, not increase the debt of the State a dollar.

THE UNITED STATES AND OTHER STATES REISSUE BONDS FOR LOST ONES WITHOUT SPECIAL LEGISLATION THEREFOR.

As observed in the Report of the Special Committee to the House of Representatives in 1896, the great bulk of the indebtedness of the United States and of the States and of Cities is now in bonds payable to bearer, and that to refuse to reissue in cases of proved loss or destruction would be but a convenient form of repudiation of so much indebtedness as losses will inevitably occur. The policy therefore of the United States and of other States has been to reissue such in such cases without special legislation. Thus, in Massachusetts it is provided in the public Laws 1882, p. 186:

"When it appears to the Governor and Council by clear and unequivocal proof that any interest bearing bond of the Commonwealth, which is identified by number and description, has without bad faith upon the part of the owner been lost or destroyed, wholly or in part, the Governor and Council shall under such regulations and with such restrictions as to time and retention for security, or otherwise, as they may prescribe, direct the Treasurer to issue a registered duplicate of such bond, having the same time to run, bearing like interest as the bond so found to have been lost or destroyed, and so marked as to show the original number of the bond lost or destroyed, and the date thereof, etc."

The State of Georgia provides that when any bond or coupon is mutilated or destroyed, the Governor may issue a new bond. *See Code of Georgia, Sections 952. 953.*

A similar provision is made by Act of Congress for bonds defaced or destroyed. *Section 3,072 of the Revised Statutes U. S.*

If our claim was against the State of Massachusetts, or the State of Georgia, or the United States, no Act of the Legislature or of Congress would be necessary. The bonds would be at once renewed and funded by the Treasurer as a matter of course. Will this State do less justice to its creditors?

"SOMETHING WRONG ABOUT THE CLAIM."

Finally it is said that there may be something wrong about the claim. How can there be? The claim has been continuously in the Courts in a case instituted by the State itself under an Act of the Legislature, and in which every Attorney General of the State has taken part. A case, in which investigation after investigation, *judicial* and *expert*, has been made, and each of which has resulted in a favorable report or judgment—a case, in which every Judge in the State at the time of the *mandamus* proceeding had occasion to pass upon its merits and approved it. To claim nothing from the character of those *now* urging it, can it be that there was anything wrong about a claim made by gentlemen so eminent in their profession and in the State for probity and honor as well as for ability and learning as the late Judge Pressley and Mr. Samuel Lord? Were these gentlemen robbers and plunderers to set up a false and unrighteous claim? Would not some one of the Attorney Generals or of the Judges have put his finger upon any suspicion of wrong, did such exist?

Then it has been falsely said that the claim is a trumped up one by Charleston lawyers to raid the State. We will not permit ourselves to condescend to answer this further than by pointing to the record, which shows that we have come in under the call of the State itself to prove, not *our* claim, but the claims of *our clients* (*bona fide* creditors of the State Bank) to these bonds, and have done so in open Court. (See list of creditors in the Appendix hereto annexed.)

We have been told that we "*have had our day in Court*" and that the Legislature should not be annoyed again with our claim—that it is in the interest of the public that there should be an end of litigation, etc. It is true that we "*have had our day in Court*," and in that day the Courts have decided unanimously in our favor, and have referred us to the Legislature for payment. It is those, who are refusing to carry out the decree of the Courts, that are carrying on the contention and not permitting an end of litigation. What would be thought of a private debtor who claimed release from a judgment debt because he had once refused to pay it?

The very pertinacity, with which we are charged in the persistence of our claim, is evidence at least of the strength and sincerity of our conviction as to its rightfulness and justice. If there indeed was "*anything wrong*" in our case, we would scarcely dare challenge again and again an investigation into its merits.

Other claims against governments have been refused again and again, and at last acknowledged and paid. For instance, the French Spoliation Claims, which are now at last being paid by the United States Government after nearly a century of refusal to do so. A horse taken from a woman in Virginia during the Revolution was paid for in 1831, after its payment had been refused year by year by Congress. And so we are confident will this claim of ours be sooner or later recognized and settled. It will be an ugly item, indeed, if left unsettled when the refunding of a portion of the debt of the State becomes necessary in a few years. Financiers will likely ask if the State may not refuse to recognize the debt of any other bonds which may happen to be lost.

What shall we say more? Will the General Assembly make an exception in this case, and refuse to allow the bonds in question to be funded, when it has allowed it to be done in every other similar instance? The State admits its obligation to fund or pay these bonds to some one. The Courts have declared the State Bank to be the owner

of the bonds, and the Receiver of the Bank the only person entitled to fund them. No one else can now under any pretence claim them. The Attorney General declares that "*the bonds in question constitute an existing adjudicated part of the debt of the State.*" If this was the case of a private debtor, the State, through its Courts, would require the debtor to meet the obligation. Will the State do less of its own free will than it would compel its citizens to do? The State cannot be sued—as the Courts have said, the Legislature itself only can do justice in this case. To the Legislature we appeal, not for a gratuity, but for the simple justice of the settlement of an honest debt. We are making no raid upon the Treasury, but asking only the settlement of an adjudicated claim.

Let it not be said of our own State of South Carolina, what the President of the American Bar Association has recently had to say of the United States Government, viz.: that it is the most inexorable of creditors and the most dishonest of debtors.

Very respectfully,

H. A. M. SMITH,

Receiver of the State Bank under orders of the Courts of the State of South Carolina in the proceedings within mentioned.

McCRADYS & BACOT,
ASHER D. COHEN,
LANGDON CHEVES,
SMYTHE, LEE & FROST,
BURKE & ERCKMANN,
BARRON & RAY,
GEO. W. CROFT & SON,

Attorneys for the Creditors of the State Bank.

APPENDIX.

I.

MESSAGE FROM THE GOVERNOR.

MESSAGE NO. 3.

State of South Carolina,
Executive Chamber.

Columbia, S. C., January 15, 1902.

Gentlemen of the General Assembly:

In further explanation of my reference to certain bonds carried on the books of the State Treasurer as "old bonds not fundable (Act of 1896) Blue Ridge Railroad bonds $37,000," I desire to submit the attached correspondence, including an opinion of the Attorney General, which was obtained at the request of the State Treasurer.

Respectfully submitted,

M. B. McSWEENEY,
Governor.

Columbia, S. C., November 1, 1901.

Governor M. B. McSweeney, Columbia, S. C.

Dear Sir: I find on the books of this department certain bonds as part of the debt of the State, entered as "old bonds not fundable (Act 1896) Blue Ridge Railroad bonds, $37,000."

These bonds were issued in 1859 and matured in 1879. By the Act of 1896, the Treasurer is forbidden to pay, consolidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds. I am in doubt as to how longer to report these bonds. If they are no longer fundable, why carry them longer as a part of the debt of the State? But while on the one hand the Treasurer can neither pay nor fund them,

on the other he has no authority to write them off the books. They are claimed as lost bonds, as is generally known, by the receiver of one of the old banks of the State—The State Bank. I should be glad to have the opinion of the Attorney General upon the subject, and your advice thereon.

Very respectfully,

R. H. JENNINGS,

State Treasurer.

Columbia, S. C., December 31, 1901.

Hon. G. Duncan Bellinger, Attorney General, Columbia, S. C.:

Dear Sir: Governor McSweeney directs me to hand you the enclosed letter from the State Treasurer, and to ask that you will comply with the request of the State Treasurer for an opinion on the subject contained in his letter.

Please be kind enough to furnish this opinion as soon as you can conveniently do so.

Yours very truly,

E. H. AULL,

Private Secretary.

Columbia, S. C., January 1, 1902.

His Excellency, the Governor:

Dear Sir: I have carefully considered the matter of your letter of the 31st ult., and the accompanying letter of the Treasurer calling your attention to the subject of the bonds in question, upon the status of which my opinion is desired.

I cannot better state the condition of these bonds than by quoting from the report of the case of *Lord, Receiver, vs. Bates, Treasurer*, in 48 S. C. Rep., 95. From this report it appears:

That that action was based upon a petition by Samuel Lord, as receiver of the late corporation known as The President, Directors and Company of the State Bank, praying for a writ of *mandamus* against Hon. W. T. C. Bates, State Treasurer, requiring him to fund the bonds in question, alleged to be the property of said corporation, which have been lost. The case was heard by the Supreme Court of four Justices on the 18th of May, 1896, and by them the

same day ordered to be argued before the full Court. Accordingly it was argued on the 30th day of May, 1896, before the full Court, consisting of the four Justices of the Supreme Court, and the following Circuit Judges: Hon. James Aldrich, Hon. Ernest Gary, Hon. D. A. Townsend, Hon. R. C. Watts, Hon. W. C. Benet, Hon. O. W. Buchanan, and Hon. Joseph H. Earle—Messrs. McCradys & Bacot appearing for the petitioners, and Mr. Attorney General Barber *contra*.

In delivering the opinion of the Court, Mr. Justice Eugene Gary makes this statement of the case:

"The State Bank was incorporated as a banking institution prior to the late war.

"In order to prevent confusion, it may be well to state at the outset that the State Bank was a private banking corporation, and The Bank of the State was a public corporation established for the benefit of the State.

"Upon the siege of the City of Charleston in 1863, the assets of the State Bank were removed to the town of Camden, where in 1865 they were taken from the agent of the bank by soldiers in the invading army of Gen. Sherman, then passing through the State. In 1869, an Act was passed entitled, 'An Act to enable the banks of the State to renew business or to place them in liquidation.' Prior to the passage of said Act, George Garvin, a creditor of the State Bank, filed a creditor's bill against the President, Directors and Company of the State Bank, alleging the insolvency of the bank.

"In pursuance of the provisions of said Act, the Attorney General intervened in the cause, and upon his motion an order was made appointing James B. Betts receiver of all the assets of the bank.

"Among the assets of the bank which were taken from the agent at Camden, as aforesaid, were one hundred bonds of the State of South Carolina, issued in aid of the Blue Ridge Railroad, under an Act of the Legislature passed in 1854, numbered from 801 to 900, and each of the denomination of one thousand dollars.

"Nineteen of said bonds had been recovered by the bank before the appointment of said receiver.

"At the next term of the Court an order was entered reciting that it was made in pursuance of the Act of 1869, aforesaid, whereby the receiver was required by advertisements in the cities of Charleston, Columbia and New York to call upon all persons having claims against the bank to present them to him, 'on or before 12 o'clock of Saturday, 31st of December, 1870, or be debarred from the benefits of the final settlement of the accounts of the said bank.'

"This order also enjoined the Treasurer from paying either the principal or interest upon any of the eighty-one bonds remaining outstanding to any person except to the said receiver. The receiver was ordered in his advertisements to call upon all persons holding any of these bonds to present the evidence of their rights to them, and he was required to report the claim and the evidence of them at the February Term, 1871. A copy of this order was served on the Treasurer.

"Mr. Betts, the receiver, having died, on motion of the Attorney General, Benjamin C. Pressley was appointed in his place February 4, 1876, and Mr. Pressley having been elevated to the bench, on motion of the Attorney General, Mr. Samuel Lord was appointed in his place by order of the Court, 4th May, 1878. Upon entering upon his duties as receiver, Mr. Lord discovered that while the order of the 20th of April, 1870, had enjoined the *payment* of the bonds mentioned it had not enjoined the *funding* of them under the Conversion Act of 1869, or under the Consolidation Act of 1873, and that in the meanwhile several of these bonds had been funded, and were thus lost to the receiver. Another order was thereupon made by the Court on the 30th July, 1878, enjoining the State Treasurer from *funding or consolidating* any of the remaining outstanding bonds.

"None of the bonds have been since knowingly funded or paid by the Treasurer. Orders for releasing the injunction, and for the funding of specific bonds as they were recovered from time to time had been made in each instance, until the

23d of November, 1883, when the injunction was modified so as to allow the receiver to fund the bonds recovered by him without further special orders. Sundry more of these bonds having been recovered from time to time were under the last order funded by the receiver, and the proceeds distributed under the orders of the Court.

"The charter of the State Bank expired in 1874 and was not renewed.

"Edward Sebring, President of the bank, died in 1880, leaving Charles Kerrison as sole surviving director and trustee. The original plaintiff, George Garvin, abandoned the conduct of the action.

"On the day of June, 1894, a supplemental complaint was filed by Robert Mure and W. I. Middleton, surviving copartners of the firm of Robert Mure & Co., and Edward McCrady and Alfred Chisolm, executors of William C. Bee, deceased, against Charles Kerrison, sole surviving director and trustee of the State Bank, and W. T. C. Bates, State Treasurer. Both defendants answer the supplemental complaint.

"On the 29th June, 1894, His Honor Judge Witherspoon made an order by which the case was referred to Wm. Gibbes Whaley, one of the Masters for Charleston County, to enquire and report which, if any, of the bonds in question had been funded and which, if any, were still outstanding, unpaid and unfunded, with leave to report any special matter.

"The Master reported that thirty-eight bonds, which he enumerated by their specific serial numbers, 'are still outstanding and unpaid,' and 'that the said bonds are the property of the late corporation known as the President, Directors and Company of the State Bank, and that the receiver of the said corporation is the only person entitled to fund and collect the same from the Treasurer of the State.'

"Upon the hearing of the cause on the 21st August, 1894, the Hon. O. W. Buchanan, Attorney General, appearing for the State Treasurer, His Honor Judge Witherspoon entered an order confirming the report as follows:

" 'I further find that the said bonds so claimed in the supplemental complaint and found in the said report to be outstanding and unfunded, to wit: (then follows an enumeration of the bonds) are the property of the President, Directors and Company of the State Bank, and that the receiver of the said corporation is the only person entitled to fund and collect the same from the Treasurer of the State.'

"From this order there was no appeal."

Having obtained this judgment of the Court that the bank was the owner of the bonds, and that the receiver was the only person entitled to fund and collect the same from the Treasurer of the State, Mr. Lord, the receiver, applied to the Legislature, under the order of the Circuit Court, for leave to fund them, and a Joint Resolution for the purpose was passed by the Senate, but failed in the House, whereupon the receiver in March, 1896, applied to the Supreme Court for a writ of *mandamus* as above mentioned, requiring the Treasurer to fund the bonds under the funding Acts of the State, as if he, the receiver, actually had presented the bonds, and upon this application the case was heard as above stated.

While the Court (consisting of the Judges of the Supreme Court, and the Circuit Judges) after full argument held by a majority that the Treasurer was not authorized under the fundings Acts to fund lost bonds without special action of the Legislature, though the Court had decided that the bank was the owner and the receiver the only person entitled to do so, (two members, Mr. Justice Jones and Judge Earle, dissenting and holding that the receiver having shown the ownership of the bonds, and their loss, was entitled to fund them, without any action on the part of the Legislature), throughout its opinion Judge Witherspoon's decree is treated as a final and binding judgment as to the ownership of the bonds, Mr. Justice Eugene Gary, in delivering the opinion of the Court, saying:

"It is our opinion that His Honor Judge Witherspoon did not intend by his decree in any manner to interfere with the statutory remedy for funding the bonds in question.

We are satisfied that it would be unjust to him to hold otherwise. His decree, when read in connection with the pleadings and the order of reference, shows that *the ownership of the bonds was the matter in issue and which it was his intention to adjudicate by his decree.*"

And Mr. Chief Justice McIver in a concurring opinion saying:

"While fully convinced of the justice of the relator's claim to the bonds, which he is seeking to have funded under the several funding Acts referred to in the opinion of Mr. Justice Gary, I am unable to perceive that there is any such plain, ministerial duty imposed upon the Treasurer of the State by such funding Acts, the performance of which can be enforced by the writ of *mandamus.*

* * * The fact that the relator has obtained the judgment of a Court of competent jurisdiction in a case to which the State Treasurer was a party, that the bonds in question are the property of a corporation which the receiver represents, and that he, as such Receiver, 'is the only person entitled to fund and collect the same from the Treasurer of the State,' cannot affect the question which the Court is called upon to decide. Such judgment may be of the strongest persuasive force in inducing the Legislature to make provision for the funding of these bonds by the relator, as it has done in other cases where the funding of lost or destroyed bonds has been authorized; but until such provision has been made, I do not see how it can be said that there is any such plain, ministerial duty imposed upon the Treasurer to fund the bonds here in question, the performance of which can be enforced by *mandamus.*"

And so Judge Benet, on the circuit, ordering another application by the receiver to the Legislature for the funding of the said bonds, observes:

"The whole Court, including the Circuit Judges of the State, who were called in under the provisions of the Constitution to hear the cause *en banc*, as well as the members of the Supreme Court, uniting thus in opinion as to the merits of the claim of the Receiver to the funding of the

bonds, to-w[illegible] that point has been finally adjudged in his favor; but differing only as to his right to have the same funded without the further action on the part of the General Assembly—it is, therefore, ordered," etc.

It must be remembered that the judgment or decree of Judge Witherspoon that the bank was the owner of these bonds, and its receiver the person to fund them, was made not in a private cause, but one in which the State has been a party since 1870, the receiver having been appointed not at the instance of private parties but upon motion of the Attorney General at the instance of the Comptroller General under the Act of 1869 requiring the old banks to resume business or to be put in liquidation.

Under these proceedings, the State, by its receiver, took from the officers of the bank its assets and proceeded to wind up its affairs. On the motion of the Attorney General an injunction was issued forbidding the Treasurer from paying or funding any of these lost bonds, and on his motion parties claiming any of these bonds were called in to prove their ownership. The State at the inception thus took charge of the investigation of the ownership of the bonds, and at its instance, with the Treasurer a party to the supplemental proceedings, the decree of Judge Witherspoon was ordered. It is true that no judgment or decree against a State can be enforced against its consent, but if a State can be bound in any instance by proceeding in a Court, the decree in this case in regard to the ownership of these bonds, I am of opinion, is final and binding upon it, and that it owes these bonds to the receiver of the State Bank as much as it owes any other bond to the holder thereof.

The Treasurer calls attention to the Act of 1896, limiting the time in which bonds may be funded. (Statutes, Vol. XXII, 183.) This Act forbids the Treasurer from funding or paying bonds after the expiration of twenty years from the maturity of such bonds. The bonds in question, it appears, were issued in 1859 and matured in 1879, and so in 1899 fell under the Act of 1896. But the State is not bound by any act of limitation, nor does this Act purport

to be such. It forbids the Treasurer to pay or fund; it does not and cannot control the State itself any more than any other Act which may be repealed or modified by the Legislature at its pleasure. But even was this Act to be regarded as a Statute of Limitation, it could have no application to the case in question, in which the claim of the State Bank for these bonds has now been before the Courts and Legislature for thirty odd years, and that at the instance of the State itself.

The Treasurer has certainly no right or authority to cancel or write off these bonds from the books of the Treasury of the State as a part of its debt. That can only be done by an affirmative Act of the Legislature itself.

I am of opinion that the bonds in question constitute an existing adjudicated part of the debt of the State, and as such can only be disposed of by some Act of the Legislature.

Respectfully,

G. DUNCAN BELLINGER,

Attorney General.

II.

LIST OR TABLE OF

LOST OR DESTROYED BONDS AND STOCK OF THE STATE OF SOUTH CAROLINA, WHICH WERE RE-ISSUED BY THE GENERAL ASSEMBLY BETWEEN 1877 AND 1888.*

		AMOUNT	STAT. AT LARGE
Feby. 1878	Dr. Joseph Winthrop, construction of new State House ...$	3,320.00	Vol. 16, p. 642
	Dr. Joseph Winthrop, Fire Loan,	93.00	Vol. 16, p. 642
Mar. 1878	Phineas Pierce.....	1,783.98	Vol. 16, p. 646
	John V. Cowling, Trustee....	4,469.05	Vol. 16, p. 659
	All Saints School Fund, Fire Loan	1,260.00	Vol. 16, p. 660

*It has *always* been the wise and "*the best policy*" of the State of South Carolina, and been deemed "*equitable and just*" on the part of the State, to defend and maintain her credit, of whatever kind or nature, and under all administrations and conditions. Lost or destroyed *Checks* and *Due Bills* of her Treasurer, as well as her lost or destroyed *Bonds* and *Stock* as above, have been provided for by her General Assembly (*see* Statutes at Large, Vol. 16, p. 599; Vol. 17, p. 314 and p. 536; Vol. 18, p. 271, etc.). Between

Alex. H. Chisolm, Blue Ridge Railroad Company.....	37,000.00	Vol. 16, p. 661‡
John H. Alston and C. LaBruce, Fire Loan.....	1,666.67	Vol. 16, p. 664
C. LaBruce.....	150.00	Vol. 16, p. 664
Samuel Mortimer and John LeBruce, Executors	1,500.00	Vol. 16, p. 666†
Mrs. A. B Gibson, Blue Ridge Railroad Company.....	5,000.00	Vol. 16, p. 666†
A. M. Forster, Blue Ridge Railroad Company.....	8,000.00	Vol. 16, p. 666†
A. M. Forster, for others, Blue Ridge Railroad Company....	2,000 00	Vol. 16, p. 666†
A F. Weston and A. Robertson, Trustees, Blue Ridge Railroad Company.....	6,000.00	Vol. 16, p. 666†
P. W. Fraser and B. P. Fraser,	6,000.00	Vol. 16, p. 666†
Richard S. Porcher.....	500.00	Vol. 16, p. 666†
Henry R. Tyler, construction of State Capitol.....	210.00	Vol. 16, p. 676
Dec. 1878—Alexander Robertson, Executor, Trustee, construction of State Capitol	3,000.00	Vol. 16, p. 821
Chas. Richardson Miles, Executor, State Capitol Loan.....	4,600.00	Vol. 16, p. 841

the close of the war in 1865 and the year 1878, while the State Government was in the hands of the Republicans, there are numerous instances of the re-issue by the General Assembly of lost or destroyed Bonds and Stock (*see* Statutes at Large, Vol 14. p. 418, p. 419, p. 705, p. 707, and p. 708; Vol 15, p. 286, p. 1008; Vol. 16, p. 204, p. 207, p. 213, p. 214, p. 215, and p. 221, etc.). The same wise policy was invariably pursued prior to and during the war—and notably between the year 1877 and the year 1888, as shown by the above list. Since the year 1888 the State Bank has been the only applicant for re-issue of lost or destroyed *ante bellum* State Bonds, because *all other* lost or destroyed *ante bellum* State Bonds and Stock had been previously provided for and re-issued and those of the State Bank are now the only outstanding ones. And it is the same whether the loss or destruction occurs by reason of war or otherwise—though, if occurring by reason of war, as in the case of the State Bank, the case is a stronger one for relief.

The State Bank asks and expects and is entitled to the same relief (no more, but no less) as has been heretofore invariably accorded to every similar applicant, whether an *individual* or a *corporation*, by the General Assembly of the State.

‡See, also, Joint Resolution at page 450 of Volume 19 of the Statutes at Large of South Carolina.

†See, also, Joint Resolutions at page 819 of Volume 16, and at page 205 of Volume 17, of the Statutes at Large of South Carolina.

Dec. 1879—	Chas. Richardson Miles, Administrator, construction of State Capitol	5,000.00	Vol. 17, p. 198
	Chas. Richardson Miles, Administrator, Fire Loan	2,000.00	Vol. 17, p. 198
	Chas. Richardson Miles, Administrator	301.06	Vol. 17, p. 198
	Chas. Richardson Miles, Administrator, Blue Ridge Railroad Company	11,000.00	Vol. 17, p. 198
	David H. Smith, Trustee, Fire Loan	8,500.00	Vol. 17, p. 200
	Allard H. Belin, Trustee, Fire Loan	6,000.00	Vol. 17, p. 200
	H. D. Lesesne, construction of State Capitol	400.00	Vol. 17, p. 219
Feb. 1880—	Alexander Robertson, for his children, construction of State Capitol	2,000.00	Vol. 17, p. 313
	R. Swaffield, Executor, State Capitol	190.00	Vol. 17, p. 315
Dec. 1880—	James Kelly, State deficiency	93.76	Vol. 17, p. 535
Jany. 1882—	South Carolina Society, Blue Ridge Railroad Company	27,000.00	Vol. 17, p. 1136
	South Carolina Society, building of State Capitol	2,000.00	Vol. 17, p. 1136
	Peter C. Gaillard, Trustee	80.00	Vol. 17, p. 1137
	E. E. Jenkins, Executor	859.15	Vol. 17, p, 1143
Dec. 1882—	Chas. M. Schott, Blue Ridge Railroad Company	2,000.00	Vol. 18, p. 279
Dec. 1887—	Mary E. Fleming	145.00	Vol. 19, p. 1179
	Mary E. Fleming	1,000.00	Vol. 19, p. 1180
		$155,121.67	

N. B.—The above list shows that the State, through her General Assembly, has re-issued $98,000.00 of lost or destroyed State *bonds* of the very same class or issue as are the bonds owned by the State Bank, viz, of the issue under the Act of 1854 in aid of the Blue Ridge Railroad Company; the loss or destruction of many of which was identical with the loss or destruction of the bonds of the State Bank.

III.

LIST OF

THE CREDITORS OF THE STATE BANK, WHOSE CLAIMS HAVE BEEN PROVED BEFORE THE STATE COURT IN THE CASE ABOVE MENTIONED, WHEREIN H. A. M. SMITH, ESQ., HAS BEEN APPOINTED RECEIVER IN PLACE OF SAMUEL LORD, ESQ., DECEASED.

Lien Creditors.	*Residence.*
Est. Wellington Stevenson	Aiken, S. C.
Est. Alex. McLoy	Charleston, S. C.
Est. C. D. Ahrens	" "
Geo. F. Kriete	" "
General Creditors.	
Est. Wm. C. Bee	" "
Est. L. Gamlrill	" "
Robt. Mure & Co	" "
Phineas Pierce	"
T. I. McNish & Co	"
John B. Manning	New York.
C. Bouknight	S. C.
J. B. E. Sloan	Charleston, S. C.
E. M. Moreland	" "
Est. I. S. K. Bennett	" "
R. B. Dowie	" "
T. D. Oxmer	
H. Beatty & Co	Greenville, S. C.
Est. C. D. Franke	Charleston, S. C.
Morris Israel	" "
Goodrich, Wineman & Co.	" "
Marine Bank of Savannah, Ga	Savannah, Ga.
Laurassen & Smith	
Fennimore C. Marsh	Ohio.
Thos. S. Marr	
Est. Henry D. Alexander	Charleston, S. C.
Est. Edward Sebring	" "
Lucius A. Wagener	" "
Thos. Choate	" "
J. E. Byrnes	" "
—— Dothage	" "